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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

GORDON D. SIMMS,
PETITIONER

v.

FIRST GIBRALTAR BANK, FSB,
now known as FIRST MADISON BANK, FSB,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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13 pp

QUESTIONS PRESENTED

A. Whether, in action under Title VIII [Civil Rights Act, 1968 (Fair Housing Act), 42 USC 3601 et seq.], *jury verdict, upon evidence otherwise sufficient, finding defendant acted both willfully and because of race in denying plaintiff financial assistance* may be reversed on appeal because statistical evidence was not also produced to show non-protected parties received dissimilar treatment.

B. Whether, in Title VIII fair housing case, *jury verdict finding discriminatory practice by defendant* may be reversed on appeal in circumstance where defendant did not articulate contemporaneous, non-discriminatory reasons for its adverse actions and jury considered all reasons given at trial to be pretextual,

and, if so,

C. Whether, in Title VIII fair housing case, *jury verdict finding discriminatory practices by defendant* may be reversed upon appeal when there is sufficient evidence to support findings: i) that the articulated (post hoc) reasons of the defendant are discredited; ii) the handling of the provision of financial services did not conform to customary industry practices, iii) there was evidence of egregious mendacity, and, iv) the defendant refused to give contemporaneous reasons for adverse actions though required to do so by law.

D. Whether, in Title VIII fair housing case, *jury verdict, finding that denial of financial services by defendant lender (affecting 50 or more families and a local protected community) resulted in an adverse disparate impact upon a protected racial minority and upon a minority community* may be reversed on appeal because the reviewing court finds no evidence of an offending "policy, practice or procedure".

LIST OF PARTIES

The parties to the proceeding below are set forth in the caption are as follows:

1. Gordon D. Simms, Petitioner

2. First Nationwide Bank, a Federal Savings Bank, f/k/a First Gibraltar Bank, FSB, Respondent.

The following persons, and the class to which they belong, have asserted a claim in this proceeding in the trial court below, but their claims have been severed and are not directly presented in this appeal, viz:

3. Doris Mannings
4. Robert Stanford
5. Rosa Lee Faulkner
6. Bernice Snowden
7. Robert Sanford
8. Donna Rhodes
9. Shirley Hewitt
10. Robert Edwards
11. Willie Bea Johnson
12. Erma Woodward
13. Maria Banks
14. Bertha Castle

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A Proof that financial services were made unavailable because of race is not limited to a particular form by Congress or by the Courts. Proof of entirely comparable transactions is not required in every case. 11

B&C In a Title VIII fair housing case, the evidentiary basis for a jury verdict finding that violation has occurred because of race will be adequate, as a matter of law, when it is supported by prima facie proof of discrimination and evidence discrediting the proffered explanation for the challenged fair housing act or decision. 16

D Proof of an action by defendant portending foreseeable disparate effects upon identifiable minority families and minority community (which are shown to have occurred) will supply the "because of race" component in a fair housing case, unless the defendant shows non-discriminatory business justification. Plaintiff in an FHA case is not always required to show a continuing series of such actions resulting from a "practice" or a "policy". 20

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IN THE
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GORDON D. SIMMS,
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FIRST GIBRALTAR BANK, FSB,
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RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

Petitioner Gordon D. Simms respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States court of Appeals for the Fifth Circuit, entered in the above-entitled case on May 31, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (E. Grady Jolly, C.J.) is reported at 83 F.3d 1546 and is reprinted in Appendix A hereto, p.A-1, *infra*. Circuit court's order denying rehearing and rehearing en banc is reprinted in Appendix B at page A-28, *infra*.

The Memorandum and Order of the United States District Court for the Southern District of Texas, Houston Division (Kenneth M. Hoyt, Judge) has not been reported. It is reprinted in Appendix C hereto, p. A-30, *infra*.

Oral opinion of the trial court in overruling Defendant's Motion for Directed Verdict (Kenneth M. Hoyt, Judge), is reprinted in Appendix D hereto, p. A-32, *infra*.

Oral opinion of trial court in overruling objection to charge (Kenneth M. Hoyt, Judge) is reprinted in Appendix E hereto, p.A-34, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on the 31st day of May, 1996.

The order denying the Petition for Rehearing was entered on the 16th day of July, 1996. Suggestion for Rehearing En Banc had been filed on the 14th day of June, 1996, and en banc rehearing was denied and the Suggestion for Rehearing En Banc was treated as a Petition for Rehearing, and it was denied on the 16th day of July, 1996. A copy of the order of the 16th day of July, 1996, is re-printed at p.A-28, *infra*.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c) and Rule 13.4 of the rules of this Court.

STATUTES INVOLVED

This proceeding was brought under Title VIII of the Civil Rights Act of 1968 (Fair Housing Act) 42 U.S.C. 3601 *et seq.*, especially § 3602(f) defining "discriminatory housing practice" as an act unlawful under Section 804, 805 or 818 [42 USC §§3604, 3605, 3606 or 3618]; 3604(a) [making unavailable a dwelling because of race]; 3604(b) [discriminating in provision of services because of race]; 3605(a)(1) [making unavailable "financial assistance" because of race].

Certain duties were mandated to defendant by the Equal Credit Opportunity Act (ECOA) 15 U.S.C. § 1691 *et seq.*, especially § 1691(a)(d)(1)-(3), and the Community Reinvestment Act (CRA) 12 U.S.C. 2901 *et seq.*

Regulations which have been issued under the CRA and ECOA. Relevant to this case are:

> Community Reinvestment Act Regs. 12 C.F.S. Ch. V (1/1/87 - 1/1/89 Ed.), *et seq.*, esp. at §§ 528.2(a),(c); 527.2(a),(b); 531.8(a),(c), (d)(6),(7); 528.3(a),(b); 528.4;
>
> Equal Credit Opportunity Act, Regulation B, 12 C.F.R. § 202.14;
>
> 24 C.F.R. Ch 1, Subch A., app. I, § 103.1 at 909; and
>
> 54 Fed. Reg. 3258 (1989).

STATEMENT OF THE CASE

Background Facts:

This case involves the thwarted efforts of Gordon Simms ("Simms"), the Petitioner, and his wife, Emi, to convert a 58-unit apartment complex into upgraded and secure cooperative

housing for low-income, minority residents. The project was located in a formerly upper-class white neighborhood which had progressively changed from white, to mixed, to predominantly black.

The City of Houston offered H.U.D. grant funds of $406,000, and the National Cooperative Bank of Washington, D.C. ("NCB") offered matching funds, up to $500,000, to complete the conversion. First Gibraltar Bank, F.S.B., ("First Gibraltar") was a required participant because it was holder of *a non-personal liability*, first lien mortgage. All funds supplied for the purpose of upgrading the project and bringing about its conversion were to be subordinated to First Gibraltar's already existing first lien position.[1] Also, the H.U.D. grant and the NCB loan required as a condition that there be participation by a private lender. First Gibraltar's continued position as a first lien holder would have met this requirement.

What was requested of First Gibraltar was a commitment letter which would have allowed detailed planning to be completed. Actual construction was to proceed *only after approval of more detailed plans* by the City of Houston, NCB, and First Gibraltar. The rejection by First Gibraltar of Simms' request meant the requirements of the City of Houston with respect to the H.U.D. grant and the NCB loan requirements could not be met. Further detailed planning, which then had little likelihood of being utilized or compensated, could not proceed. First Gibraltar was in a position to vitiate the project, and it did so.

Inasmuch as the proposed replacement of the First Gibraltar loan would result in: a $44,000 reduction in the outstanding principal of the loan, an increase of the interest rate from 7.25

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[1] First Gibraltar's officer in charge, Chastain, was informed by NCB (Opinion p.A-4), by Simms (*id.*), and by a fellow First Gibraltar employee (Appendix G p.A-37) that First Gibraltar would be able to retain its first lien position under the terms of Simms' proposal.

percent to 10.5 percent, personal liability of housing cooperative and substantially-enhanced collateral [upgrade and conversion financed by $406,000 grant from City of Houston (H.U.D. funds) and $500,000 loan from National Cooperative Bank], Petitioner, Simms, demanded an explanation for the rejection of his proposal. He demanded an opportunity to discuss his proposal with the president of Respondent. Simms was refused reasons and refused an audience. The Equal Credit Opportunity Act made such a requested explanation mandatory. [15 U.S.C. § 1691(a)(d)(1)-(3)].

The only reasonably believable explanation for rejection was the virtual admission of racial bias made by loan officer of Respondent at the time of trial that he would rather have (white) Simms (with no personal liability) on the note than a (minority-owned) co-op (that was personally liable). (See p.12, *infra*).

The trial court found (p.7 *infra* and Appendix E p.A-34), and four officers of First Gibraltar (by letters or testimony) acknowledged, that First Gibraltar was in the business of rendering the services requested and continued to negotiate in respect to the Simms project in the fall of 1989 and in 1990. The opinion largely ignores all testimony save that of Chastain and overlooks 12 loans in the affected census tract of uncertain racial origin.

The complaint below was filed *pro se*, asserting discrimination and arbitrary non-compliance of First Gibraltar with, *inter alia*, FHA, ECOA and CRA[2] because of the manner in which the application of Simms was processed and rejected which amounted to the withholding of financial services upon grounds found to be willfully false and because of race. (Answers of Jury to Jury Questions 2 and 4).

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[2] Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. 3601 *et seq.*; 15 U.S.C. § 1691 *et seq.* (Equal Credit Opportunity Act); and 12 U.S.C. § 2901 *et seq.* (Community Reinvestment Act).

Because of First Gibraltar's refusal to plead or to supply reasons for rejection, and because of federal common law authority giving no weight to post hoc explanations or post hoc offers of non-discriminatory reasons, Simms filed a motion in the course of his trial, before the opening of defendant's case, asking that all reasons or explanations offered by the Respondent in justification of rejection of Simms' request for financial services be barred from evidence (Record p.742). Motion was overruled.

Findings By the Jury:

The jury necessarily made, *inter alia*, required findings in response to jury questions 1, 2 and 4 as follows, viz:

1. First Gibraltar's denial of financial assistance was a discriminatory housing practice;[3]

2. First Gibraltar's denial of financial assistance had a discriminatory effect upon minority persons or a minority community; and

4. First Gibraltar was guilty of "ill will, bad faith, spite or gross indifference".

Findings By the Trial Court (Excerpts):

The trial court in denying the defendant's motions for an instructed verdict made, *inter alia*, the following conclusions, viz:

> "In my opinion, the discriminatory practices, if any, engaged in by First Gibraltar are not simply ones that must be proved by some statistical analysis. That is a way of proving it but that is not the only way of

[3] See definition of "discriminatory housing practice", 42 U.S.C. § 3602(f) and in Court's charge to jury (see Appendix F pp.A-35 - A-36).

> proving discrimination. Just as it doesn't require a person bringing a class action to prove discrimination of an individual nature." (Appendix G p.A-32).
>
> "This is not a red lining case. And in my opinion, the plaintiff does not have to show that Gibraltar has a practice or habit of discriminating against black people or black property in black areas. They simply have to show that they discriminated on this occasion. This is an individual bringing an individual lawsuit based upon a package that he presented to that institution." (Appendix G p.A-32).
>
> ". . .[Y]ou are placing a burden on the plaintiff that the plaintiff doesn't have. The plaintiff doesn't have to prove that there is red lining in order to show there is discrimination. . . . I disagree that the statistical analysis is required for this particular case, period." (Appendix G p.A-33).

In response to demands by defendant that the court's charge require plaintiff to prove that white applicants presenting proposals similar to the Simms proposal received dissimilar treatment, the trial judge ruled as follows:

> "It is undisputed. That is why I overruled your objection. . .. What I am telling you is I am not confusing the proposal that Mr. Simms presented with the services that he requested. . . . The services he requested are the services that were under consideration. And those services, undisputedly are services that are requested by other people all over town. That is the whole business of savings and loan institutions is to consider loan requests, loan modifications, refinance, drop clauses, add clauses and increase interest. That is the stuff they do. It is not in dispute. That is why I am overruling your objection." (Appendix E p.A-34).

The Opinion of the Panel Majority (Synopsis of Controlling Rulings):

In concluding that the actions of First Gibraltar were not undertaken because of race, the Fifth Circuit panel majority announced and applied certain rules it asserted to be applicable. What follows is a fair statement of the adjudicative reach of what the panel majority has decided, viz:

1) To support finding of fair housing violation, petitioner must (in every case[4]) prove that similar "non-protected" applications received dissimilar treatment (Opinion p.A-27).

2) Jury verdict **finding** fair housing violation, upon sufficient evidence to make prima facie case and to permit disbelief by jury of defendant's articulated reasons (Opinion p.A-22), may be reversed upon appeal, (Opinion p.A-26,27), and

   verdict finding fair housing violation is not reasonably supported even though there may be evidence of unexplained departures from "customary industry practices" (Opinion p.A-26 - A-27) and some evidence (but not compelling evidence) of "highly unusual" treatment (Opinion p.A-24) and proof of "false representations" (Opinion p.A-26) and evidence that required (ECOA) contemporaneous explanations (Opinion p.A-25) were not made.

3) Petitioner must identify a discriminatory policy, procedure or practice having a significantly greater impact upon members of the protected class in order to show disparate impact; a single decision or act will

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[4] No allowance is made in the opinion for proof of discriminatory intent by other direct or circumstantial evidence.

not suffice **(even if shown to have foreseeably caused extensive, disparate harm)**. (Opinion pp.A-18 - A-19); and

4) Disparate impact from a single act or decision will not support jury finding of disparate impact upon members of protected class or upon protected community.

Also, the panel majority seems to have misread *Hicks* [*St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993)], though *Hicks* is cited in the Opinion. For it is unclear from the Opinion below that some attainable level of mendacity (including perjury clearly intended to cover up racial bias), or level of arbitrariness (up to and past the point of refusal to comply with the clear mandate of E.C.O.A. to give a written explanation), plus direct evidence and disparate effects will suffice to supply the "because of race" requirement and sufficiently support a jury finding of racial motive. For *Hicks*, at least, assures that the finder of facts **may** find racial motivation when the justifications of the Defendant are pretextual--especially when there is a suspicion of mendacity. The record contains evidence of arbitrary conduct, departures from normal procedures, actions taken against the normal business interests of the defendant and much falsehood. Petitioner contends that these raise inferences of racial motivation.

But Circuit Judge Jolly, even after conceding that the jury was not bound to believe Appellants' *ad hoc*, stated justifications, summarized for the panel majority the court's holding concerning the obvious mendacity of Defendant First Gibraltar, viz:

> "The FHA does not create a cause of action for bungling a deal, failing to follow industry custom, violating the Equal Credit Opportunity Act, or even making false representations [about the project] to a government agency [H.U.D.]." (Opinion p.A-26).

REASONS FOR GRANTING THE WRIT

Summary of Argument:

The points of decision set forth in Judge Jolly's Opinion, now published (83 F.3d 1546), have become a part of federal common law. What has been decided is novel, far reaching, and not generally in accord with decisions of this Court and decisions of circuits other than the Fifth Circuit. Three alarming features set forth below must be corrected immediately because of the virtual certainty that unwarranted dismissals of meritorious claims of fair housing act violations will follow in their wake.

I

Under the Opinion of the panel majority, a plaintiff in a Title VIII fair housing complaint, alleging discriminatory treatment, brought in the Fifth Circuit (or in any other circuit which may be persuaded by the majority Opinion), must establish a prima facie treatment case, present a challenge to the credibility of the defendant's articulated non-discriminatory explanations, **and produce evidence that similar, non-protected acts or decisions have received dissimilar treatment**, in order to assure that a jury verdict favoring the complainant will stand on appeal.

II

On the other hand, if a Title VIII fair employment case is brought and disparate impact is pled and sought to be proved, the complainant must, in addition to his prima facie case of disparate impact, prove **that the disparate impact or effects upon protected individuals or upon a protected community, are produced by a policy, practice or procedure and evidenced by a series of acts**. If the claimed housing violation consists of a single act or decision by the defendant and the plaintiff is unable to establish similar occurrences, the case will fail under the rule announced by a majority of the Fifth Circuit

panel below. The ruling is in direct conflict with *Council 31 AFSCME v. Ward*, 987 F.2d 373 (7th Cir. 1992).

Neither of the results of the Fifth Circuit Opinion (I or II above) can be said to have a basis in the plain language of the Fair Housing Act nor claim support by necessary implication.

III

The third, and most compelling, reason why certiorari must be granted is that the Fifth Circuit seems to be "kicking against the goad and lowing all the way" in regards to the not-so-mysterious rules laid down in *St. Mary's Honor Center v. Hicks*, *supra*. The majority ruling is in direct conflict with the opinion of this Court in *Hicks* to the extent that *Hicks* applies to a title VIII case.

Brief of Argument:

A **Proof that financial services were made unavailable because of race is not limited to a particular form by Congress or by the Courts. Proof of entirely comparable transactions is not required in every case.**

The panel majority, unsustained by cited authority, imposes a new standard that requires statistical proof gained from comparisons between "protected" and "non-protected" transactions as the foundation of any proof of "because of race" motivation under FHA.

The *McDonnell*[5] formulation is a useful aid that permits inference that an action has been taken or withheld "because of race" without requirement that the evidence contain comparisons of "protected" and "non-protected" transactions. Suggestions by

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[5] *McDonnell Douglas v. Green*, 411 U.S. 792, 804, 93 S.Ct. 1817, 1825, 36 L.Ed.2d 668 (1973).

the Court in *McDonnell* that, on retrial, the plaintiff be permitted to show that implicated white employees were treated differently than implicated blacks (411 U.S. 792 at 804) and that: ". . . statistics as to petitioner's employment policy and practice **may be helpful** to a determination of . . . a general pattern of discrimination against blacks (*id.* at 805) do not effect a judicial fiat requiring Simms to make statistical comparisons.

This Court has held that a single discriminatory action is not immunized by absence of discrimination in making other decisions. *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 97 S.Ct. 555, 564, fn.14 (1977) ("*Arlington I*"). Though statistical proof gained from comparisons is of some evidentiary value in determining likely motivation, clearly this Court does not consider it to be the *sine qua non*. There is no statutory warrant for this. Under *Hicks* (see B&C below) the inquiry is moot because pretext has been proven.

Perhaps the least discredited and most likely reason for First Gibraltar's rejection of the proposed minority-owned co-op loan was the entirely post hoc discriminatory explanation given at trial by respondent's loan officer in charge, viz (from Chastain's testimony, reprinted as Appendix H at p.A-39):

> "My concern as a lender is that . . . the [minority-owned] co-op would be in charge of the apartment house and not Mr. Simms. We would have no one to turn to" (--i.e., minority-owned co-op equals "no one to turn to").

This simple statement does not stand on statistical comparisons. With no prior (before the questioned transactions) contact with Simms (who bore no personal liability), no familiarity with the project (where it was located, how old it was, whether or not it needed repairs, etc.) , and with a most casual familiarity with the co-op proposal, Chastain knew immediately he would rather have Simms as the nominal borrower, with no personal liability, than

the minority-owned co-op with personal liability and a reduced loan balance and greatly enhanced collateral. The spin placed upon the just-quoted Chastain statement by the Court of Appeals, with no transcript reference, is unreasonable, unnecessary and clearly not a "view of the evidence most favorable to the plaintiff" or the view most likely accepted by the jury. It does not accord with the generous review standard set forth in *Jones v. Walmart Stores*, 870 F2d 982, 987 (5th Cir. 1989) cited by the panel majority.

Federal common law favors the inferences of intent recited below and supports the jury determination that the offending actions of First Gibraltar were because of race, viz:

Shifting *post hoc* explanations of Defendant's staff weigh on Plaintiffs, not Defendant's side of the scale [*Texas World Service Co., Inc. v. N.L.R.B.*, 928 F.2d 1426 (C.A.5 1991), p.1435,36 (court held substantial evidence supported finding of violation where justifying explanations were shifting and false reasons); *N.L.R.B. v. Georgia Rug Mill*, 308 F.2d 89, 91 (C.A.5 1962) (court held shifting explanations given by employer regarding firing of employee strengthened the claims by the plaintiff of unlawful motive); *Furnco Const. Corp. v. Waters*, 98 S.Ct. at 2949-2950 (1978), 438 U.S. at 577; see especially, as supplemental authority, *Huntington Branch NAACP v. Town of Huntington*, 894 F.2d (2nd Cir. 1988) at p.940, quoting *Securities Indus. Ass'n. v. Board of Governors*, 104 S.Ct. 2979 (1984), 468 U.S. 137, 143-144; 104 S.Ct. 2979, 2982-83; 82 L.Ed.2d 107 (1984) (acts of an employer who resorts to falsehood more likely than not are based on consideration of impermissible factors); *Kobrin v. University of Minnesota*, 34 F.3d 698, 703 (8th Cir. 1994) ("Substantial changes over time in the employer's proffered reason for its employment decision support a finding of pretext"); *see also Howard v. BP Oil Co.*, 32 F.3d 520, 526 (11th Cir. 1994) ("identification of inconsistencies in the defendant's testimony is evidence of pretext"); *Briscoe v. Fred's Dollar Store*, 24 F.3d 1026, 1028 (8th Cir. 1994) (substantial disparity between reasons

offered at discharge and those advanced at trial support conclusions of pretext); *Norris v. City & County of San Francisco*, 900 F.2d 1326, 1331 (9th Cir. 1990) (that defendant's rationale has shifted over time is 'likely to generate serious adverse inferences as to the pretextual nature of its explanations'); *N.L.R.B. v. Int'l. Furniture Co.*, 199 F.2d 648, 649-50 (C.A.5 1952) (frequent shifting of explanations raised inferences against Defendant sufficient to support finding of unlawful purpose)].

Unexplained egregious mendacity cannot be passed off as a social norm or small aberration from which reasonable probability of guilt may not be inferred. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2749 (1993) does not so hold nor does it reverse *Furnco Const. Corp. v. Waters*, 98 S.Ct. 2943 (1978) at 2949-50. Exceptions to rule that lying infers discriminatory motive cited in *Hicks*, so far, generally exist only where mendacity is shown to have served another purpose or is explained--clearly not the case here (see *Hicks* at 113 S.Ct. 2742, 2750-51).

Substantive departure from normal practice. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp., supra.* Held: substantive departure from normal practice--especially where circumstances strongly favored a decision contrary from decision that was made--will infer discriminatory motive.

Departure from normal decision making. *Resident Advisory Board v. Rizzo*, 564 F.2d. 126 (3rd Cir. 1977). Held: Departure from normal decision-making will raise an inference of improper motive.

Actions taken where circumstances generally favor a contrary decision. *Village of Arlington Heights, supra* at pp.564, 565. Unexplained actions against real interest may raise an inference of racial motivation.

Arbitrary refusal to give required explanations. Equal Credit Opportunity Act [15 U.S.C.S.1691 et seq., § 1691(a), (d)(1)-(3)]. Written disclosure of reasons for denial of a loan request is mandatory under the act.

Defendant's failure to offer evidence, if any, peculiarly under its control. *Furnco Const. Corp. v. Waters*, 98 S.Ct. 2943 (1978), 438 U.S. 577. Failure to make contemporaneous explanations and failure to produce files and "loan package" require a conclusion of discriminatory motivation. The circumstances are such as to arouse suspicion. "First Gibraltar presented no contemporaneous written record of its handling of the proposal or its reasons for the rejection" (Opinion p.A-9). Chastain never produced or admitted possession of actual loan package from Tomlinson explaining fully the proposal. See Tomlinson memo to Chastain, p.A-37.[6]

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[6] It is not believable that Chastain was confused about the basic concept of cooperative housing (nor is it believable that Simms provided no explanation of the concept of a co-op with his package), since Simms testified that he explained the proposal and the "scope of the project" in his initial conversation with Brenda Tomlinson, the GSA employee to whom Simms initially presented the proposal (Tr. Vol.4 p.4-14; also see Opinion pp.A-4 - A-5), and evidence in the record (P. Exh. 9, reprinted as Appendix G at p.A-37) clearly shows that Tomlinson received a "package" and understood the concept of cooperative housing and made at least one attempt to convey that concept to Chastain (Appendix G p.A-37). It was reasonable for the jury to disagree with the panel majority's belief, expressed in its Opinion at pp.A-6 and A-24, that later, semantical errors by Simms caused Chastain to misunderstand the concept of cooperative housing. The record also shows that, to aid in reassuring First Gibraltar of the secure nature of the transaction, Simms provided the phone number for one of the parties to the proposed transaction, National ***Cooperative*** Bank, and encouraged First Gibraltar to direct any inquiries regarding the nature of a banking transaction involving a housing cooperative to either himself or to NCB (see Opinion p.A-6). Further, Brenda Tomlinson, in her memo to Chastain (p.A-37) clearly describing the concept of cooperative housing, requests that Chastain contact her with any questions regarding Simms' proposal.

Public policy declared by the Congress requires that the lender disclose its reasons for denial.[7]

The Court of Appeals was fully briefed in regard to each of the foregoing categories of circumstantial evidence. Its answer to such authority is found on page A-26 of the Opinion, viz:

> "The FHA does not create a cause of action for bungling a deal, failing to follow industry custom, violating the Equal Credit Opportunity Act, or even making false representations [about the project] to a government agency [H.U.D.]."

B&C **In a Title VIII fair housing case, the evidentiary basis for a jury verdict finding that violation has occurred because of race will be adequate, as a matter of law, when it is supported by prima facie proof of discrimination and evidence discrediting the proffered explanation for the challenged fair housing act or decision.**

The panel majority cite certain title VII and ADEA cases in respect to its adverse holdings upon which reversal has been predicated. For such reason, petitioner turns to Title VII and ADEA authority to illuminate the error of the Opinion:

The majority's ruling squarely conflicts with the language and the import of the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993). The Court in *Hicks* ruled that while disbelief of the employer's asserted legitimate reason for the challenged action does not compel judgment for the plaintiff as a matter of law, the factfinder's

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[7] Equal Credit Opportunity Act [15 U.S.C.S.1691 et seq., § 1691(a), (d)(1)-(3)].

"rejection of the defendant's proffered reasons," together with the elements of the prima facie case, "is enough at law to sustain a finding of discrimination." Id. at 2749 n.4. "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." Id. Because the factfinder's "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination[,] . . . upon such rejection, no additional proof of discrimination is required." Id. at 2749 (internal quotation omitted).

Under *Hicks* that rejection of the employer's proffered reasons, plus prima facie proof, "will permit the trier of fact to infer the ultimate fact of intentional discrimination," *Hicks*, 113 S. Ct. at 2749. This is not inconsistent with the "holding" of *Hicks*. In fact, Justice Scalia in footnote 4 (p.2749) of *Hicks* specifically stated that "there is nothing whatever inconsistent between" the quoted passage and the Court's "later statements that (1) the plaintiff must show 'both that the reason was false, and that discrimination was the real reason,' [113 S.Ct. at 2752], and (2) 'it is not enough . . . to disbelieve the employer,' [113 S.Ct. at 2754]." 113 S.Ct. at 2749 n.4. Indeed, Justice Scalia reconciled these pronouncements by reaffirming that while "rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination, there must be a finding of discrimination." *Id.* This statement is thought to be the Supreme Court's summary of its opinion by a Sixth Circuit panel. [*Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994)]. In *Simms v. First Gibraltar*, we have a finding such as *Hicks* calls for.

Given the explicit language in the *Hicks* decision, and the rule that lower courts owe obeisance to such pronouncements, whether portrayed as holding or dicta, it is not surprising that the panel majority's ruling is inconsistent with the decisions of the vast majority of federal appellate courts to have considered this

issue.[8] *See Kobrin v. University of Minnesota*, 34 F.3d 698, 703 (8th Cir. 1994) (plaintiff may overcome summary judgment by producing evidence that, if believed, would allow reasonable jury to reject defendant's proffered reasons for its actions); *Fuentes v. Perskie*, 32 F.3d 759, 762, 764 (3d Cir. 1994) ("if the plaintiff has pointed to some evidence discrediting the defendant's proffered reasons, to survive summary judgment the plaintiff need not also come forward with additional evidence of discrimination beyond his or her prima facie case"); *Howard v. BP Oil Co.*, 32 F.3d at 527 (Eleventh Circuit held that "fact finder's rejection of defendant's proffered reasons is sufficient circumstantial evidence upon which to base a judgment for the plaintiff"); *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d at 1083 & n.3 (Sixth Circuit held that to establish jury question on issue of discrimination, plaintiff must produce sufficient evidence form which jury may reasonably reject employer's explanation);[9] *Seman v. Coplay Cement Co.*, 26 F.3d 428, 433 (3d Cir. 1994) (judgment as a matter of law for defendant "inappropriate" because plaintiff had established prima facie case of age discrimination and "presented substantial evidence creating a factual dispute concerning [defendant's] legitimate business reasons"); *Durham v. Xerox Corp.*, 18 F.3d 836, 839-40 (10th Cir.) ("[A] prima facie case combined with disproof of the employer's explanations . . . may permit the factfinder to infer intentional discrimination, and thus preclude summary judgment for the employer."), *cert. denied*, 115 S.Ct.

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[8] The significance of several of these cases is found in the rationale of the decision and not the outcome. Some of the cited decisions reviewed summary judgments, while others assessed the merits of post-trial motions for judgment as a matter of law. Because the legal standard governing sufficiency of the evidence and summary judgment is "essentially the same," *see supra* note 4 (citing *Armstrong v. City of Dallas*, 997 F.2d 62 (5th Cir. 1993), 997 F.2d 62 at 66), the interpretation and application of *Hicks* in either context is directly on point.

[9] Contrary to the panel majority's description, *Manzer* did not concern "the issue of the ADEA's application to religious institutions." *See Rhodes II* (*infra*. pp.19-20), at *15 n.8.

80 (1994); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1108-10 (8th Cir.), *cert. denied*, 115 S.Ct. 355 (1994) ("[I]f (1) the elements of a prima facie case are present, and (2) there exists sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its actions, then the evidence is sufficient to allow the jury to determine whether intentional discrimination has occurred."); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1122-24 (7th Cir. 1994) (to defeat summary judgment, plaintiff "must only 'produce evidence from which a rational factfinder could infer that the company lied' about its proffered reasons for his dismissal") (quoting *Shager v. Upjohn Co.*, 913 F.2d 398, 401 (7th Cir. 1990); *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1316 (4th Cir. 1993) (plaintiff may defeat summary judgment by presenting prima facie proof and raising "a genuine dispute of material fact about [employer's] proffered explanation for the discharge"); *Washington v. Garrett*, 10 F.3d 1421, 1433-34 (9th Cir. 1993) ("[T]here will always be a question for the factfinder once a plaintiff establishes a prima facie case and raises a genuine issue as to whether the employer's explanation for its action is true.").

The panel majority held that a reasonable factfinder, as a matter of law, cannot infer unlawful discrimination from prima facie proof and evidence that the defendant's proffered explanation is unworthy of belief; an additional showing from statistical comparisons of protected and non-protected events is required. [Opinion B(3) p.A-25]. The majority thus readopted a "pretext-plus" rule for discrimination claims that it embraced in *Rhodes II* [*Rhodes v. Guiberson Oil Tools*, 39 F.3d 537 (5th Cir. 1994)] before *Rhodes III* [*Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996)] was decided. Pretext-plus still reigns, in spite of attempts by a divided en banc court to resolve conflict between *Hicks* and the pretext-plus rule. Simms suffers from the uncertainty this has produced, separating the Fifth Circuit from other circuits and from a correct application of *Hicks*.

D **Proof of an action by defendant portending foreseeable disparate effects upon identifiable minority families and minority community (which are shown to have occurred) will supply the "because of race" component in a fair housing case, unless the defendant shows non-discriminatory business justification. Plaintiff in an FHA case is not always required to show a continuing series of such actions resulting from a "procedure" or a "policy".**

The Congress specifically defined "unfair housing *practice*" (our emphasis) to be and include "an act" [§3602(f)], not a "policy" or "procedure". The proscribed "act" may be a "practice" so long as the practice is considered also to be an "act" covered by the FHA. Failure to issue the commitment was an act complained of (Opinion p.A-9) and a practice from which disparate effects clearly and foreseeably flowed.

The panel majority cites *Anderson v. Douglas & Lomason Co., Inc.* [26 F.3d 1277, 1294 (5th Cir. 1994) (Title VII), *cert. denied*, 115 S.Ct. 1099, 130 L.Ed.2d 1066 (1995)] as holding that a single act or decision will not support a disparate impact analysis, but proof must be made of a "policy, procedure or practice". (Opinion p.A-18 - A-19). The holding, as adapted and misapplied, causes *Simms v. First Gibraltar* to be in direct conflict with *Council 31 AFSCME v. Ward*, 987 F.2d 373, (7th Cir. 1992) holding to the contrary. Were *Anderson* actually to so hold, it would be in conflict with the 7th, 8th and 9th Circuits (at least), as shown *infra*, p.21. (Judge Garza, who wrote the *Anderson* opinion, did not give his approval to the majority opinion in this case which made such an unnatural adaptation of *Anderson*, but joined only in its result instead [under the Fifth Circuit standard, we assume]).

There is no employment case truly apposite to housing cases like this one or like *Arlington II* [*Metro Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290, on remand from U.S. Supreme Court, 429 U.S. 252, 97 S.Ct. 555;

cert. denied, 434 US 1025, 98 S.Ct. 752], *Rizzo* [*Resident Advisory Board v. Rizzo*, 564 F.2d 126 at 143 and esp. at 144 (3rd Cir. 1977)], and *Huntington* [*Huntington Branch NAACP v. Town of Huntington*, 894 F.2d (2nd Cir. 1988)], where a single decision or act making unavailable an entire housing project has a very foreseeable, community-wide impact adversely affecting hundreds of families. But *Council 31 AFSCME v. Ward*, 987 F.2d 373 (7th Cir. 1992), a Title VII case, reasons as follows:

> ". . . [T]here is 'precious little' case law on the meaning of 'employment practice' . . . . [T]he term 'employment practice' must refer to any of the enumerated acts, most of which could be characterized as single decisions of an employer. **There is no question that single decisions are actionable under this same section when consciously motivated by race.** (Our emphasis). *See, e.g., Artis v. Hitachi Zosen Clearing, Inc.*, 967 F.2d 1132 (7th Cir. 1992) (single recall decision). **It is difficult to see why the result should be any different when the decision is challenged on the grounds of disparate impact.** . . . For instance, we have found two appellate opinions dealing with the disparate impact of layoffs that may be characterized as challenges to single decisions of employers. *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1073-74 (9th Cir.1986) (company decided to use performance ratings based on subjective criteria for purposes of single layoff); *Nolting v. Yellow Freight System, Inc.*, 799 F.2d 1192, 1194 (8th Cir.1986) (disparate impact case under Age Discrimination in Employment Act; decision to use performance ratings for single layoff decision)." (emphasis added).

The Opinion below by Judge Jolly, joined in by Judge Davis, conflicts in "head on" fashion with the language just quoted from *Council 31, AFSCME*. The panel majority relied

entirely upon *Anderson v. Douglas & Lomason Co., Inc., supra,* for its striking conclusions--an unwarranted application and construction of *Anderson*. *Anderson* is another Title VII case involving a class action--not in any fashion apposite to this analysis. There a class could be defined only in terms of its standing under a policy or practice having continuing or sustained past effects. This case involves a clearly-defined rejection of a minority co-op borrower (Opinion p.A-9). That rejection adversely and virtually immediately impacted a minority neighborhood and many minority families.

The Congress has proven itself quite capable of conditioning statutory coverage upon findings of habitual conduct or of a "pattern or practice" (former Section 3613[a]). Involvement of the United States Attorney General in fair housing enforcement was formerly conditioned upon "reasonable cause to believe" that a "pattern or practice" of fair housing violation existed. 42 U.S.C. 3813 as passed April 11, 1968, PL 90-284, Title VIII.[10] It is therefore inappropriate for the courts to assume the burden of Congress and slice away a portion of the protection granted Simms and those with like standing with purely court-made obstacles to recovery for Congressionally-defined wrongs. Unlike a "bad"dog concerning which the law is said to allow one "free" bite, a fair housing violator--especially a sophisticated FHA, CRA, ECOA lender--gets judged when it gets caught. A string of noticed offenses need not be proved. Apart from his own opinion, Judge Jolly cites nothing convincing to the contrary.

CONCLUSION

The Opinion of the panel majority contains error of law sweeping and unconditional in its coverage. The error identified is in direct conflict with *Hicks* and *Anderson* and does great

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[10]The provision was dropped by amendment September 13, 1988, PL 100-430.

disservice to the landmark discrimination case *McDonnell Douglas v. Green, supra*. The latter now has insinuated upon it a new authority to require statistical comparisons of protected and non-protected events in all discrimination cases. The striking down of Simms, for whatever reason, cannot be allowed to so severely damage all discrimination jurisprudence.

The Simms case was tried under *Hicks*, *Huntington* and *McDonnell Douglas* and reviewed under *Rhodes II* and *III* and a strained application of *Anderson*. It was tried to a jury, but decided by a panel majority. Simms clearly prevailed under the authority that should have been applied and fairly persuaded the trier of facts to whom he addressed his case. If the trial court was in serious error in any respect in his conduct of the trial, Simms still is not shown as deserving of a reversal. For he met all burdens assigned to him by the trial court and had no opportunity to meet any other burdens.

For the above reasons, this Court should grant its Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this matter.

DATED: October 15, 1996

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CERTIFICATE OF SERVICE

I, Raymond M. Hill, Attorney for Petitioner, do hereby certify that on this the 15th day of October, true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Supreme Court were sent by certified mail, return receipt requested, to the following counsel for Respondents:

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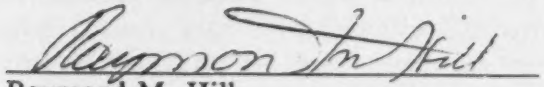

Raymond M. Hill

APPENDIX A

Gordon D. Simms, et al., Plaintiffs,

Gordon D. Simms, Plaintiff-Appellee,

v.

First Gibraltar Bank,
et al., Defendants,

First Gibraltar Bank, FSB, now known
as First Madison Bank, FSB,
Defendant-Appellant.

No. 94-20386

United States Court of Appeals,
Fifth Circuit.

May 31, 1996.

* * *

Appeal from the United States District Court for the Southern District of Texas.

Before JOLLY, DAVIS and EMILIO M. GARZA, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

In this Fair Housing Act case, Gordon D. Simms, a white landlord, contends that First Gibraltar Bank violated the Act when it refused to issue a commitment letter to refinance its existing loan on Simms' apartment complex in a predominantly

minority area with a loan to a cooperative housing corporation that probably would be minority owned. We hold that Simms failed to identify any discriminatory policy, procedure, or practice on which to base a discriminatory effects claim. We also hold that Simms failed to adduce sufficient evidence from which a reasonable jury could infer intentional discrimination under a discriminatory treatment theory of liability. Accordingly, we reverse the judgment of the district court and remand for entry of judgment in favor of First Gibraltar.

I

A

Simms owned the Forest Garden Apartments (the "apartment complex"), a fifty-eight unit complex located in a predominantly-minority neighborhood in Houston, Texas. Simms purchased the apartment complex in 1979, in part by assuming an existing non-recourse loan from Gibraltar Savings Association ("GSA") secured by a first lien deed of trust on the property. Although GSA waived a "due-on-sale" clause[1] contained in the deed of trust, the clause continued in effect after the transaction.

Simms encountered numerous difficulties with the apartment complex, including tenant problems and deteriorating conditions. He realized soon after purchasing the apartment complex that it was not producing enough income to make all the necessary repairs. Simms eventually decided to pursue a plan to convert the apartment complex into cooperative housing by

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[1] A "due-on-sale" clause is a common provision in deeds of trust and mortgages. It gives a lender the right to demand full payment of the balance due on the loan secured by the deed of trust or mortgage if the borrower sells his interest in the property. In effect, it prohibits the would-be buyer of the property from assuming the existing loan without prior approval of the lender.

rehabilitating and selling it to a cooperative corporation that he planned to establish for that purpose (the "co-op").[2]

B

The Department of Housing and Urban Development ("HUD") rental rehabilitation funds from the city of Houston and permanent financing from National Cooperative Bank ("NCB")[3] became crucial components of Simms' plan. After years of negotiations between the city and Simms, the city agreed that HUD rehabilitation funds could be used for cooperative housing. The city's planning department, by letter dated November 2, 1988, notified Simms that it had retained on its active waiting list his application for rehabilitation funds in the amount of $406,000. As a condition precedent to retaining Simms' application on priority funding status, the planning department imposed a December 17, 1988 deadline on Simms to present evidence of a private lender's commitment to provide matching loan funds for the cooperative rehabilitation. Simms failed to do so.

NCB apparently was to be the source of the matching funds required by the city. In an unexecuted commitment letter[4] dated July 1, 1988, NCB offered to issue a commitment letter evidencing its promise to provide permanent financing for the co-op in the amount of $500,000. Under the terms of the

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[2] No cooperative housing existed in Texas at the time Simms was pursuing this plan.

[3] NCB is an independent banking institution chartered by Congress to fund cooperative housing.

[4] A commitment letter conveys the terms and conditions under which a lender promises to extend credit for a particular transaction. An unexecuted commitment letter represents a lender's offer to provide financing. It is not binding on the lender until the would-be borrower accepts it by signing the letter and returning it along with a commitment fee.

proposed commitment, NCB promised to provide financing if the co-op satisfied, *inter alia*, the following conditions at least sixty days prior to the scheduled closing date of the loan, July 15, 1989: (1) evidence of another lender's commitment of not less than $240,000, (2) a first lien deed of trust on the apartment complex, and (3) proof of $372,000 in committed grant funds from Houston. In another portion of the letter, NCB stated that it would consider a second lien position on a loan equal to or shorter than the first lien loan term at a higher interest rate. Simms had to accept NCB's commitment no later than August 15, 1988, by signing and returning the letter along with a non-refundable commitment fee of one percent of the loan amount, or $5,000. Simms never accepted NCB's offer.

C

On July 19, 1988, Simms spoke to Brenda Tomlinson, an employee of GSA in Houston, about his proposed cooperative conversion. He requested that GSA agree to waive the due-on-sale clause in the deed of trust so that the proposed cooperative corporation could assume the existing loan. GSA's waiver of the due-on-sale clause apparently would have satisfied NCB's condition that another lender commit not less than $240,000 to the project. Tomlinson instructed Simms that because of the scope of the request, a refinancing of the existing loan, i.e., the substitution of a new loan for the existing loan, not a waiver of the due-on-sale clause, would be the appropriate course of action. Simms wrote to Tomlinson in response to this conversation requesting a commitment letter for a new loan of $232,000, at the market interest rate of 10.5%, to replace GSA's existing loan on the apartment complex of $276,000 at 7.25%. Simms indicated in this letter that GSA would retain its first lien on the apartment complex. In other words, Simms was not asking GSA to extend any additional funds--GSA would *receive* $44,000 at closing, plus a higher interest rate on a lower loan balance, and a continued first lien position on a renovated piece of collateral. As a condition to closing on the new loan, Simms

proposed pre-sale of fifty of the fifty-eight apartments units in the apartment complex. He included with this letter a summary of the project indicating the city's willingness to provide $400,000 in rehabilitation funds and NCB's willingness to provide permanent financing in the amount of $500,000.

On November 27, 1988, Simms again contacted Tomlinson concerning his proposal for a commitment letter. Tomlinson told Simms that she was not authorized to review the proposal and that she would forward it to Del Chastain, an asset manager in GSA's Dallas office.[5] Tomlinson sent Chastain a memorandum dated November 30 outlining in general terms Simms' proposal.

Simms apparently called Chastain in early December and then sent him a package on December 7 containing the November 2 letter from the city of Houston, the unexecuted and expired NCB commitment letter, and the financial details of his cooperative conversion plan.[6] Simms stated at the close of the cover letter to the package:

> [T]he Gibraltar refinance would not occur until *after* the property is at least 80 percent sold (or leased with option to buy) to co-op buyers, and construction is completed and approved by city inspectors. At present, only a firm letter of

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[5] The record shows a dispute as to the cause of the four-month delay after Simms' initial contact with Tomlinson. Simms claimed at trial that he thought Tomlinson was processing the application during that time, asserting that she may have called him at some point. In Tomlinson's memorandum to Chastain dated November 30, 1989, she wrote, "This project was placed on hold after our initial discussion; however, on Monday Mr. Simms advised me they are now proceeding fully and hope to close within 45 days." Simms denied at trial that he placed the application on hold.

[6] Simms was making regular and timely payments on the existing loan at the time of the application and throughout the review period.

> commitment, contingent on the foregoing, is requested.

Simms indicated in this cover letter that GSA would retain its first lien position. He stated that he had been in contact with the city concerning the looming December 17 deadline for supplying the requested commitment letter. Simms stressed that the deadline was actually a "target, not a limit," and gave the name and number of a city official who could provide additional information about the rehabilitation funds and the deadline. He also gave a contact name and number at NCB, although he did not mention the fact that the deadline for accepting NCB's commitment had expired.

Simms' package did not contain any information on cooperative housing, even though no co-ops existing in Texas at that time. He did not explain that it was shares in the co-op itself that would be sold to co-op buyers, but instead said in his cover letter to Chastain that the "property" would be sold to co-op buyers. Even the unexecuted NCB commitment letter spoke in terms of "presales of the 58 units."[7]

In mid-December, Chastain apparently called Simms to discuss the conversion proposals. Simms testified that they had a lengthy conversation, with Chastain asking a number of general questions about the project. Neither Simms nor Chastain, however, could recall many of the details of the conversation.

D

In the meantime, GSA joined the lengthy list of failed savings and loans in Texas. As a result, GSA is no more. On

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[7] Tomlinson was the only person to mention in writing the sale of shares. She stated in her November 30 memorandum to Chastain, "This program would involve reorganizing ownership into a non-profit corporation, and selling shares of the corporation to the tenant/owners."

December 28, 1988, in an agreement wit the Federal Savings and Loan Insurance Corporation (the "FSLIC"), appellant-defendant First Gibraltar Bank ("First Gibraltar")[8] purchased certain assets of GSA (and four other failed thrifts) from the FSLIC,[9] including the loan on the apartment complex. First Gibraltar did not assume the liabilities of GSA.[10]

At some point in late December or early January, Chastain presented Simms' proposal to Rick Carlton, his supervisor, and Zac Isaacs, legal counsel to the bank. On January 5, 1989, Chastain, who continued in the employ of First Gibraltar, called Simms to inform him that First Gibraltar had rejected his proposal. First Gibraltar never sent a written rejection of the proposal. Simms testified that he was given no reason for this rejection other than that First Gibraltar "did not wish to participate," though he did admit that they "talked in generalities" about the proposal. Chastain apparently told Simms that Simms "would be wasting [his] time" to come to Dallas to talk about the proposal. Chastain allegedly dissuaded Simms from talking to the president of First Gibraltar, Carl Webb.[11] Simms testified that he considered his proposal "dead" and thus did not take any other action in the immediate aftermath of First Gibraltar's rejection. Simms did not approach any other lenders about his proposal.

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[8] First Gibraltar changed its name to First Madison Bank in February 1993.

[9] GSA went into FSLIC receivership in late 1989.

[10] The precise relevance of evidence relating to GSA's conduct in the processing of Simms' application is somewhat problematic given the fact that First Gibraltar did not assume GSA's liabilities.

[11] Simms asserted that Chastain refused to give the name and number of Webb, though he did admit that Chastain told him that the president would simply refer Simms back to Chastain. Webb testified that he normally did not become involved in the lending process. "We had many, many lending relationships and I don't think that that is what the president of a banking organization does."

E

The deterioration of the apartment complex accelerated over the ensuing months. A rainstorm in October 1989 was the "coup de grace" according to Simms--leaking roofs made most of the units uninhabitable. Simms again contacted First Gibraltar in October. He wrote a series of letters to Webb and had numerous telephone conversations with various First Gibraltar officials. He apparently notified the bank that he could no longer make the payments on the loan and offered the bank a quitclaim deed to the property. The bank allegedly insisted that Simms continue to manage the property and look for a buyer. In October 1990, First Gibraltar accepted a no-strings $81,000 offer from a third party for its deed of trust on the property, after rejecting an earlier offer of $90,000 that required the bank to provide interim financing for another proposed upgrade.

II.

A

In November 1989, Simms filed complaints with the Office of Thrift Supervision and HUD against First Gibraltar, alleging that racial animus motivated First Gibraltar's denial of his proposal. After both agencies found no evidence of discrimination, Simms and two former apartment complex residents filed suit in the United States District Court for the Southern District of Texas against First Gibraltar, alleging, *inter alia*, violations of the Fair Housing Act (the "FHA"). The district court dismissed the claims of the two former residents for lack of standing.

Simms stipulated before trial that he was not attempting to prove that First Gibraltar violated the FHA under a

"redlining" theory,[12] though the racial composition of the area in which the apartment complex was located--a critical part of a traditional "redlining" case--played a crucial role in his argument. Instead, Simms' theory of the case was that First Gibraltar violated the FHA by refusing to give him a commitment letter because it did not want to issue a new loan to a co-op that probably would be minority-owned to replace the existing loan to him, a white landlord. He also argued that First Gibraltar violated the FHA because of the discriminatory effects of its decision not to issue a commitment letter.

B

First Gibraltar presented no contemporaneous written record of its handling of the proposal or its reasons for the rejection. The testimony of Chastain, the only First Gibraltar official directly involved in the rejection of Simms' proposal who testified at trial, is thus crucial to our review because it is the only direct evidence in the record of First Gibraltar's handling of the proposal and its reasons for rejecting it.

Chastain acknowledged that neither he nor First Gibraltar had any experience in cooperative housing, and that he did not understand how co-ops worked. He also acknowledged that Simms' proposal confused him. "[Q]uite a bit of the material that he supplied to me . . . was not real clear and we were never

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[12] "Redlining means 'mortgage credit discrimination based on the characteristics of the neighborhood surrounding the would-be borrower's dwelling.'" *Cartwright v. American Savings & Loan Association*, 880 F.2d 912, 913 n. 1 (7th Cir. 1989) (quoting *Thomas v. First Federal Savings Bank of Indiana*, 653 F.Supp. 1330, 1337 (N.D.Ind.1987)). The term derives from loan officers evaluating home mortgage applications based on a residential map where integrated and minority neighborhoods are marked off in red as poor risk areas. Robert G. Schwemm, *Housing Discrimination* 13-42 (Release #5, 1995).

able to make some of the points clear as to what his proposal really was for."

Although Chastain admitted that the bank would have had great interest in the proposal had it retained its first lien position, he testified that the documentation that Simms submitted did not lead him to believe that the bank's first lien would be secure. Chastain's doubts stemmed from two sources. First, he allegedly believed that the sale of the apartment units--the fifty units that had to be sold as a condition to closing on the refinancing--would diminish the collateral securing First Gibraltar's loan on the apartment complex. In other words, he thought that only eight of the fifty-eight units after the conversion to cooperative housing would secure first Gibraltar's loan.[13] The written documentation appeared to confuse even Simms' own expert witness, Champney Smith.[14] Chastain also testified that he did not think that these eight remaining units

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[13] Over First Gibraltar's strenuous objection, the district court would not allow First Gibraltar to explore fully this particular reason because it was based on a "false premise." Chastain's testimony does exhibit a misunderstanding about the organization structure of a co-op. As indicated earlier, however, the record shows there was no cooperative housing in Texas at the time and neither GSA nor First Gibraltar had any experience with cooperative housing loans. The record also shows that Simms failed to provide any explanation of co-operatives in his application, and affirmatively misstated that the "property" would be sold to co-op buyers. A co-op buyer in fact purchases shares in the cooperative corporation and the right to lease a particular unit. The cooperative corporation actually owns the property and finances its ownership of the property with a blanket mortgage secured by the property. The sale of interests in the co-op does not diminish a lender's underlying security interest in the property.

[14] After examining selected portions of the proposal at the request of Simms' counsel, Smith stated: I would want to see a spreadsheet showing the partial-release clause and the cash flow as to the remaining collateral after each sale. But with that caveat, I would have no problem going forward with it.

would have been rehabilitated,[15] though Simms' counsel effectively guaranteed rehabilitation of the entire complex.[16] Second, Chastain concluded from NCB's letter that NCB required a first lien on the property. When Simms' counsel confronted Chastain with that portion of the NCB letter stating that NCB would consider a second lien, Chastain merely responded that he would have to re-read the entire letter.[17] Chastain further testified that he was concerned that a co-op of which First Gibraltar had no knowledge or record would be responsible for managing its collateral. "[I]t would put the bank in a lesser position so far as the collateral was concerned. . . ."

Chastain claimed that the bank rejected the proposal also because it did not make "economic sense" at the time. He gave a number of reasons for this conclusion. First, he stressed that both the city's and NCB's commitments remained unfulfilled.[18] He noted that the NCB letter was signed and that the time limit in the city's letter had expired. "They were undocumented as far as I am concerned." Smith, Simms' expert witness, agreed that a prudent lender would request an executed or "bankable" commitment letter, and admitted that it would not be imprudent

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[15] He testified:

> We would have whatever the remaining number of apartment units left that would not be complete, that would not be completed, there was no provisions in anything that those would be completed and we would be left holding the bag with whatever that remaining 20 percent was and looking to a co-op to complete it.

[16] The provision required that the co-op place in escrow 150 percent of the estimated cost of unfinished repairs at the time of closing.

[17] Both Chastain's supervisor and Zac Isaacs supposedly agreed at the time of the rejection that the proposal did not protect First Gibraltar's first lien position.

[18] Simms testified that Chastain never told him that First Gibraltar rejected the proposal because the formal requirements of the commitment letters were unsatisfied.

to deny a proposal based on an unexecuted, expired commitment letter. But he also asserted that it would not make sense for Simms to pay the $5,000 commitment fee to obtain a "bankable" commitment letter from NCB if Simms were unsure whether First Gibraltar would participate in the conversion plan.

Although Simms told Chastain that he could call NCB and the city about their offers, Chastain repeatedly stressed during his testimony that he did not have the resources to do the legwork for a customer on a proposal; furthermore, there was no evidence that it was customary to do so. "I was relying on the customer like all other workouts to provide me with the necessary information to make an intelligent decision on it. This information was not supplied to me. I told Mr. Simms it was not there. I never did receive anything else." Chastain claimed that he asked Simms for up-to-date information about the commitment letters, but Simms denied ever being asked for such information and asserted that he would have been willing to provide such information if Chastain had requested it. Smith, Simms' expert witness, asserted that it was the borrower's responsibility to provide information about a deal; he admitted that a lender does not have an obligation to obtain information if it asks the borrower for such information and the borrower does not supply it.

The second reason why the proposal did not make "economic sense," according to Chastain, was that there appeared to be a shortfall in financing for the rehabilitation of the apartment complex.[19] Third, Chastain claimed that he was

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[19] The financial details that Simms submitted to Chastain in early December showed that he needed $637,000 to rehabilitate the property. Chastain claimed that there was a shortfall of over $200,000 because the city rehabilitation grant was only for $406,000. He apparently did not understand that NCB's permanent financing was to be the source of the additional rehabilitation funds, although Chastain had, or course, no guarantee that NCB would supply the permanent financing because NCB's commitment letter remained unexecuted and had expired.

concerned about the proposal because of the length of time--five years--it took for Simms to obtain funding for the rehabilitation, though he later admitted that he did not know whether that was a normal or abnormal period to get approval for a housing grant. Fourth, he pointed to the lack of experience with cooperative housing in the area.

Simms' counsel attempted to elicit from Chastain his reason for not issuing a commitment letter that made the refinancing contingent on resolution of First Gibraltar's concerns about the proposal. Although Chastain admitted that he could have issued such a commitment letter, he declared that he did not do so because "the workout was not a good workout or good proposal with the information that had been supplied." Smith, Simms' expert witness, testified that a lender might issue a commitment letter with a condition that overcame an objection to a proposal, but admitted that if a lender had a number of concerns, negotiations were more appropriate. Smith also admitted that he would not issue a commitment letter if a deal did not make "economic sense."

Simms' counsel tried to impeach Chastain's testimony by asking him about an affidavit Chastain made in late 1989 during the HUD investigation into the rejection.[20] After showing the affidavit to Chastain, Simms' counsel questioned Chastain about various reasons appearing in the affidavit. First, he asked Chastain why he had stated that the deteriorated condition of the property was a reason for the rejection when Chastain had acknowledged that disrepair was not a good reason to deny a proposal to improve property.[21] Second, he asked Chastain why he had claimed in the affidavit that it would have cost more than the entire loan basis to remove the asbestos in the apartment complex. Chastain admitted earlier in his testimony that he just

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[20] The affidavit was not admitted into evidence.

[21] Chastain admitted that he did not have first-hand knowledge of the condition of the property.

assumed that asbestos was present based on the age of the apartment complex, even though he did not know the exact age of the property, and admitted "[t]here has been nothing confirmed" on the need for spending any money on an asbestos rehabilitation. Finally, Simms' counsel asked Chastain why he had declared that Simms' failure to keep up the property was a reason for the rejection when neither he nor any other employee of First Gibraltar had inspected the apartment complex.

Simms' counsel also attempted to show that Chastain did not process Simms' application in a customary manner. Simms' counsel first questioned Chastain about the procedure for processing workout proposals. Chastain testified that he first analyzed the proposal, which had to contain a list of the repairs and estimated costs. He then would inspect, or send a field inspector to inspect, the property to determine whether the proposed repairs were necessary and justifiable. Finally, he would present the proposal to his supervisor for a decision.[22] When asked why he did not make an inspection of the property, Chastain testified that "we didn't progress that far along on it. There was not enough information there to warrant us getting that involved in it."[23]

Neither side presented evidence of any other workout proposal submitted to First Gibraltar around the time or, or even after, First Gibraltar's rejection of Simms' proposal. Although Chastain mentioned that the bank was engaged actively in

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[22] First Gibraltar apparently did not have a formal loan review committee when it rejected Simms' proposal because the newly-chartered bank was not making any new loans. Chastain testified, however, that there was an informal "committee" or process for reviewing workout proposals on existing loans. He indicated that he would present them to his supervisor, and they would decide whether to approve them.

[23] Chastain did testify, though, that he had enough information to submit Simms' proposal for consideration.

workouts[24] of existing loans in November 1989--some ten months after the rejection of Simms' proposal--the record does not reveal the level of activity in the early months of 1989; First Gibraltar apparently made only one new loan in 1989.[25]

C

At the close of the evidence, the district court instructed the jury on discriminatory treatment and discriminatory effects (or disparate impact) theories of liability under sections 804(b) and 805 of the Fair Housing Act, 42 U.S.C. §§ 3604(b), 3605, and submitted interrogatories to the jury ostensibly based on each theory. The jury found First Gibraltar liable under both theories and awarded $1.21 million in compensatory damages and $2 million in punitive damages. On April 18, 1994, the district court set aside its earlier order dismissing the former residents' claims and severed these claimed from those of Simms. First Gibraltar appeals from the final judgment and from the district court's April 18 order.[26]

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[24] Chastain explained that the typical workout proposal involved a request for additional funds to make repairs to a distressed property in order to make it marketable.

[25] There are no details on this loan in the record other than the borrower's name and the amount.

[26] Simms filed a motion to strike that portion of First Gibraltar's appeal concerning the district court's April 18 order. This court carried Simms' motion with the case in an order dated July 22, 1994. First Gibraltar has abandoned any issue or argument in this appeal concerning the district court's April 18 order because it did not argue any error with respect to this order in its briefs before this court. *See* Fed.R.App.P 28(a)(5) ("The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor"); *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993) (holding that appellant abandoned argument by failing to argue it in body of brief). We therefore dismiss Simms' motion to strike as moot.

III.

The crucial question presented is whether the record contains sufficient evidence to support the jury's verdict that First Gibraltar violated sections 804(b) and 805 of the Fair Housing Act, 42 U.S.C. §§ 3604(b), 3605. Section 3604(b) provides that it is unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race." 42 U.S.C. § 3604(b) (1994). Section 3605 provides that it is unlawful for any "entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction . . . because of race." 42 U.S.C. § 3605(a) (1994). "Residential real estate-related transactions" include "the making . . . of loans or providing other financial assistance--for purchasing, constructing, improving, repairing, or maintaining a dwelling; or secured by residential real estate." 42 U.S.C. § 3605(b)(1). Simms sought recovery under both discriminatory treatment and discriminatory effects theories of liability. He relied on both of these theories to support claims under both § 3604 and § 3605.[27]

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[27] First Gibraltar contends that because Simms' complaint concerned only the availability of financing under § 3605, and not the availability of housing under § 3604(b), § 3605 is the only relevant provision. Simms argues that he was entitled to pursue the § 3604(b) claim because his tenants were denied the opportunity to purchase a dwelling. Simms' argument raises a standing question that appears to have been addressed neither by the parties nor by the district court. *See Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 263-64 & n.9, 97 S.Ct. 555, 562 & n.9, 50 L.Ed.2d 450 (1977) (refusing to address standing of a corporation to assert rights of its prospective minority tenants because of presence of one individual plaintiff who demonstrated standing). Even if we were to determine that Simms had standing to bring a §3604(b) claim, the plain language of the two provisions seems to indicate that § 3605 is the vehicle for discrimination claims involving the financing of residential housing. *See Mackey v. Nationwide Insurance Companies*, 724 F.2d 419, 423 (4th Cir. 1984) ("If § 804 was designated to reach every discriminatory act that might conceivably affect the availability of housing, § 805's specific prohibition of discrimination

Simms argued at trial that First Gibraltar refused to issue him a commitment letter promising to replace its existing loan to him, a white landlord,[28] with a new loan to the proposed co-op that probably would have been minority-owned because of the racial composition of the current tenants of the apartment complex and its location in a predominantly minority area.[29]

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in the provision of financing would have been superfluous"); *but see Laufman v. Oakley Building & Loan Co.*, 408 F.Supp. 489, 493 (S.D.Ohio 1976) ("[A] denial of financial assistance in connection with a sale of a home would effectively 'make unavailable or deny' a 'dwelling' " in violation of § 3604(b)). Because of the result we reach today, it is unnecessary for us to address these matters.

[28]First Gibraltar concedes that Simms has standing to bring an action in his own behalf under § 3605 of the FHA. The FHA states, "An aggrieved person may commence a civil action in an appropriate United States district. . . ." 42 U.S.C. § 3613 (1994). It defines an "aggrieved person" as "any person who claims to have been injured by a discriminatory housing practice." 42 U.S.C. § 3602(i)(1). A "discriminatory housing practice" is "an act that is unlawful under section 3604, 3605, 3606, or 3617 of this title." 42 U.S.C. § 3602(f). *See Old West End Association v. Buckeye Federal Savings & Loan*, 675 F.Supp. 1100, 1102 (N.D. Ohio 1987) (white homeowners have standing to maintain discrimination actions for injuries suffered by them as a result of racially discriminatory housing practices).

[29] Although Simms argued in his briefs and at oral argument that the denial of his conversion proposal on January 5, 1989, was but one of a series of discriminatory acts at issue in this case extending from December 1988 through October 1990, "when First Gibraltar maliciously filed a bad credit report against Simms," the record makes clear that the only triable issue in the case was, and is, whether First Gibraltar's denial on January 5 violated the FHA. Indeed, when First Gibraltar was putting on its defense, the district court prohibited First Gibraltar from questioning Scott Gessell, First Gibraltar's compliance officer, about allegations in Simms' case-in-chief concerning the credit report by stating, "[W]hat does it have to do with the fact Mr. Simms presented a proposal a year and a half, two years earlier and was turned down. This case is about the proposal. . . . Whether or not he was justified in [filing the credit report] is not an issue in this case. Will not be an issue presented to the jury." Neither party disputed this ruling. The district court admitted evidence of the incidents after January 5, upon which Simms now expounds as having some independent relevance, solely for the purpose of showing the

We address initially that portion of the jury's verdict finding that First Gibraltar violated the FHA based on a showing of discriminatory effects.

A

First Gibraltar argues that Simms did not present sufficient evidence to support a finding that the bank violated the FHA based on a showing of discriminatory effects. It also argues that the district court improperly instructed the jury on the standard for finding a violation of the FHA under a discriminatory effects theory. First Gibraltar in essence contends that this record simply does not present a discriminatory effects case. Simms, on the other hand, argues that he proved discriminatory effects by showing that First Gibraltar's rejection primarily affected minorities. First, virtually all of the prospective owners of the planned cooperative units would have been minorities. Second, the cooperative project would have benefited the predominantly minority community in which it would have been located.

We agree that a violation of the FHA may be established not only by proof of discriminatory intent, but also by a showing of significant discriminatory effect. *Hanson v. Veterans Administration*, 800 F.2d 1381, 1386 (5th Cir. 1986). The relevant question in a discriminatory effects claim against a private defendant, however, is not whether a single act or

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effects of the denial on January 5. Furthermore, the jury instructions indicate that it was the rejection of the proposal on January 5 that was at issue in the case. For example, the instructions state that Simms "asserts that First Gibraltar violated federal law when they [sic] failed and refused to review and/or failed to give the usual and customary review to *his proposal.*" The instructions also state that "[y]ou may find that a discriminatory housing practice on the part of First Gibraltar existed if you find from a preponderance of the evidence that Simms' *request for loan modification was handled in a [different] manner.*"

decision by that defendant has a significantly greater impact on members of a protected class, but instead the question is whether a policy, procedure, or practice specifically identified by the plaintiff has a significantly greater discriminatory impact on members of a protected class. *See Anderson v. Douglas & Lomason Co., Inc.*, 26 F.3d 1277, 1284 (5th Cir. 1994) (Title VII), *cert. denied*, ___ U.S. ____, 115 S.Ct. 1099, 130 L.Ed.2d 1066 (1995). In this case, Simms does not identify an alleged discriminatory policy, procedure, or practice of First Gibraltar, much less provide evidence, statistical or otherwise, that such policy, procedure, or practice had a significantly greater impact on members of a protected class.

We therefore conclude that Simms did not present sufficient evidence to establish a violation of the FHA under a discriminatory effects theory of liability. We next turn to examine that portion of the jury's verdict finding that First Gibraltar violated the FHA based on a showing of discriminatory treatment.

B

First Gibraltar contends that the evidence is insufficient to support the jury's finding of discriminatory treatment in violation of the FHA. We agree.

(1)

We recently held in the Age Discrimination in Employment Act ("ADEA") context that

> [t]o sustain a finding of discrimination, circumstantial evidence must be such as to allow a rational factfinder to make a reasonable inference that age was a determinative reason for the employment decision. . . . [A] jury issue

> will be presented and a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer *and* (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains.

Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1996) (en banc) (emphasis added). The holding in *Rhodes* may be appropriately applied to this FHA case in which the question is whether the plaintiff presented sufficient evidence for the jury to make a reasonable inference that race motivated First Gibraltar's rejection of Simms' proposal. We thus will sustain the jury verdict if the evidence taken as a whole, when viewed in the light most favorable to the verdict, *Jones v. Wal-Mart Stores, Inc.*, 870 F.2d 982, 987 (5th Cir. 1989), 1) creates a fact issue as to whether each of First Gibraltar's stated reasons for refusal actually motivated First Gibraltar *and* (2) creates a reasonable inference that race was a significant[30] factor in the refusal.

It is not enough merely to create a fact issue as to each of First Gibraltar's reasons for refusing to issue a commitment letter. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502,

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[30] The protected trait must only be "one significant factor" in the challenged decision to violate the FHA. *Woods-Drake v. Lundy*, 667 F.2d 1198, 1202 (5th Cir. 1982). Our decision in *Hanson* explained that "it is enough to show that race was a consideration and played some role in a real estate transaction." 800 F.2d at 1386 (citation omitted). The ADEA, on the other hand, requires that age be a "determinative factor" in the challenged decision. *Rhodes*, 75 F.3d at 994; *see Hazen Paper Company v. Biggins*, 507 U.S. 604, 610-11, 113 S.Ct. 1701, 1706, 123 L.Ed.2d 338 (1993) ("[A] disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome"). We find it unnecessary to explore the difference between these two causal formulations.

524-25, 113 S.Ct. 2742, 2756, 125 L.Ed.2d 407 (1993) ("Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of . . . race"). The evidence taken as a whole must also create a reasonable inference that race was a significant factor in the refusal. *See Polanco v. City of Austin, Texas*, 78 F.3d 968, 977-78 (5th Cir. 1996) (making same observation in Title VII context). First Gibraltar's refusal may have been unsound, unfair, or even unlawful, yet not have been violative of the FHA if there is no evidence from which a jury reasonably could infer that race was a significant factor in First Gibraltar's decision. *See Hazen Paper*, 507 U.S. at 611-13, 113 S.Ct. at 1707 (making similar observations in ADEA context); *Rhodes*, 75 F.2d at 994 (same).

(2)

We now turn to the record in this case. Simms argues that the evidence establishing a prima facie case of discrimination and discrediting each of First Gibraltar's proffered reasons for refusal, along with evidence of what he characterizes as First Gibraltar's "arbitrary and unreasonable" conduct, is sufficient for a reasonable jury to infer that race was a significant factor in First Gibraltar's refusal to issue a commitment letter.

In the light most favorable to the verdict, the evidence establishes that Simms sought a commitment letter for the refinancing of an existing loan on property located in a predominantly minority area. It also establishes that Simms applied for a commitment letter, that the proposal qualified for a commitment letter, and that First Gibraltar refused to issue the commitment letter despite the merits of the proposal. Simms, however, proffered no evidence of First Gibraltar's lending activity around the time of, or even in the months immediately after, the rejection of his proposal. He did introduce evidence,

albeit conclusory and brief,[31] that indicated that First Gibraltar was "actively engaged" in rehabilitation and workout modifications and funding in November 1989, ten months after the rejection of Simms' proposal. This evidence did not indicate whether the rehabilitation and workout modifications and funding were of a type similar to Simms' proposed refinancing. In fact, all details of these transactions are notably absent from the record, including the number of such transactions, the areas in which this lending activity occurred, and the race of the borrowers involved.

Our review of the record persuades us nevertheless that there was at least a fact issue as to whether First Gibraltar's articulated reasons for the rejection--that First Gibraltar's first lien position would be jeopardized and that the proposal did not make "economic sense," i.e., Houston's and NCB's commitment letters remained unfulfilled, an alleged shortfall in financing, the length of the time it took to put the deal together, and the lack of experience with cooperative housing in the area--were the real reasons for the rejection. First, First Gibraltar gave no specific reasons at the time of the rejection. Second, a reasonable jury could have discounted Chastain's concern that First Gibraltar's first lien position was in doubt. The sale of individual cooperative units would not have diminished First Gibraltar's collateral. Also, NCB did not require First Gibraltar to give up its first lien on the apartment complex as a condition to NCB extending permanent financing to the co-op; the NCB letter clearly indicates that NCB would consider a second lien at a higher interest rate. Third, a reasonably jury also could have discounted Chastain's contention that the proposal did not make economic sense inasmuch as Simms' proposal would have reduced First Gibraltar's exposure on the apartment complex and increased the interest rate on the remaining loan balance. Finally, Simms' efforts to impeach Chastain with Chastain's

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[31] Simms merely asked Chastain whether First Gibraltar was involved in "lots of work-outs" in November 1989; he received an affirmative response.

earlier affidavit to HUD could have led a reasonable jury to question other portions of Chastain's testimony.[32]

Simms also adduced the following evidence at trial, evidence of what he characterizes as First Gibraltar's "arbitrary and unreasonable" conduct: First Gibraltar did not give Simms written reasons for the rejection; Chastain dissuaded Simms from meeting with him or contacting the president of First Gibraltar after the January 5 rejection; Chastain did not actively solicit remedial action by Simms to save the proposal after the rejection; First Gibraltar did not inspect the property before rejecting the proposal; and Chastain submitted an incomplete application to his superior for consideration.

(3)

Even though Simms' evidence satisfied *Rhodes*' first requirement by creating a fact issue as to whether each of First Gibraltar's stated reasons for refusal actually motivated First Gibraltar, the evidence Simms offered is insufficient to satisfy *Rhodes*' second requirement. A thorough review of the record makes plain that a reasonable jury could not infer from the evidence as a whole that race was a significant factor in First Gibraltar's refusal to issue a commitment letter.[33]

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[32] Simms claims on appeal that the inconsistencies between Chastain's testimony and his earlier affidavit to HUD are evidence of discrimination because they amounted to "false representations to thwart efforts of Simms to obtain relief under the Fair Housing Act from HUD."

[33] Unlike the defendants in *Hicks* and *Rhodes*, First Gibraltar strenuously denies that the record contains sufficient evidence for a reasonable jury to conclude that Simms established a prima facie case of lending discrimination. *See Hicks*, 509 U.S. at 507-509, 113 S.Ct. at 2747; *Rhodes v. Guiberson Oil Tools*, 39 F.3d 537, 547 (5th Cir. 1994) (dissenting opinion) (reversed en banc).

Indeed, when the evidence is viewed in its full context, it is not compelling that Simms' application was treated in a highly unusual manner. First, there is no evidence that First Gibraltar was engaged in any workout or rehabilitation activity around the time of the rejection--Simms' evidence only establishes that First Gibraltar was engaged in some undefined workout activity in November 1989, ten months after the rejection. This lack of evidence particularly weakens Simms' argument in the light of the fact that First Gibraltar had just come into existence through the purchase of the assets of GSA and four other lending institutions eight days before Simms' rejection, and was, thus, in a transitional period. Second, First Gibraltar had never financed a cooperative housing project, and no cooperative housing existed in Texas, at the time of the rejection. Third, Simms' proposal was not properly documented. For example, Simms included the unexecuted and expired NCB commitment letter--unexecuted because Simms did not want to pay the commitment fee--without any explanation in his cover letter, even though the cover letter discussed the looming deadline for the city's commitment. His application also contained no explanation of cooperative housing, and, in fact, the cover memorandum to Chastain dated December 7 affirmatively misrepresented what co-op buyers purchase by declaring that closing would occur after "the *property* is at least 80 percent sold."

Simms' evidence of First Gibraltar's "arbitrary and unreasonable" conduct is also insufficient for a reasonable jury to infer that race was a significant factor in the rejection. The fundamental flaw in this evidence is that Simms offered it in a vacuum; he presented absolutely no evidence that other, "non-protected" applicants or applications were treated any differently around the time of Simms' rejection. *See McDonnell Douglas v. Green*, 411 U.S. 792, 804, 93 S.Ct. 1817, 1825, 36 L.Ed.2d 668 (1973) (ruling that retention or rehiring of white employees engaged in similar acts of misconduct would be especially relevant to showing of pretext). Simms also did not present any evidence from which it might be inferred that First Gibraltar had

a poor record of lending in minority areas or to minorities;[34] furthermore, there was not the slightest evidence of racial bias presented on the part of any of First Gibraltar's personnel. Although Simms' expert, Smith, testified that it was industry custom to provide written notification of a rejection, and the district court ruled that First Gibraltar was required to give written notification of the rejection under Regulation B of the Equal Credit Opportunity Act,[35] failure to provide written notification to Simms is insufficient to infer a racial motive on the part of First Gibraltar without some showing that other, "non-protected" applications were treated differently. In other words, failure to follow industry custom or federal regulations is not evidence from which a jury could infer racial animus unless Simms showed that First Gibraltar normally conformed with industry custom or complied with federal regulations in handling similar, "non-protected" applications. The same is true for Chastain's efforts to dissuade Simms from meeting with Chastain or talking with the president after the rejection, and Chastain's failure to actively solicit Simms to remedy what Chastain saw as the proposal's flaws.

Evidence of First Gibraltar's failure to inspect the property is similarly flawed. Simms merely elicited generalized testimony from Chastain about customary procedures for handling workout proposals from other bank customers requesting additional money to make needed repairs to existing property. Simms' proposal actually did not fall into that category; however, because he was seeking a refinancing of an

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[34] Scott Gesell, First Gibraltar's compliance officer, testified that First Gibraltar made a total of eight loans in the census tract encompassing the apartment complex in 1989. He indicated that six were home improvement loans; all he knew about the other two was that they were secured by real property.

[35] We need not reach the issue whether the district court erred as a matter of law when it concluded that First Gibraltar's failure to give written notice of its rejection constituted a violation of the Equal Credit Opportunity Act.

existing loan from First Gibraltar that would actually reduce their exposure on the apartment complex, not additional money for repairs. Thus, the fact that First Gibraltar did not inspect the property to determine whether the requested repairs were actually needed, a customary step in reviewing a workout proposal, does not permit an inference of intentional discrimination in this case. The same is true for the submission of the incomplete application to Chastain's superior.

The ultimate burden of persuasion that race was an intentional and significant factor in rejecting Simms' proposal was squarely on Simms. *Hicks*, 509 U.S. at 507-509, 113 S.Ct. at 2747. Given that the burden of proof was on Simms--and not on First Gibraltar to disprove the existence of race as a significant factor in the decision--we simply cannot conclude that a reasonable jury could infer from the evidence as a whole that race was a significant factor in First Gibraltar's refusal to issue a commitment letter.

IV

We thus sum up: The FHA does not create a cause of action for bungling a deal, failing to follow industry custom, violating the Equal Credit Opportunity Act, or even making false representations to a government agency. *See Hazen Paper*, 507 U.S. at 611-13, 113 S.Ct. at 1707 (making similar observations in ADEA context); *Hicks*, 509 U.S. at 521, 113 S.Ct. at 2754 ("Title VII is not a cause of action for perjury"). The FHA instead prohibits a lending institution from using race, or any other prohibited factor, as a basis for making a lending decision. Our holding today is therefore relatively narrow and simple: evidence of a bank's refusal to issue to a white landlord a commitment letter to refinance an existing loan in a predominantly minority area with a loan to a co-op that probably would be minority owned, along with evidence discrediting the bank's articulated reasons for refusing to issue the letter, and evidence of less than thorough handling that does not conform

generally to customary industry practices, will not support an inference of intentional discrimination without some evidence that similar "non-protected" applications have received dissimilar treatment.

For the foregoing reasons, we REVERSE the judgment of the district court and REMAND for entry of judgment in favor of First Gibraltar.[36]

REVERSED and REMANDED.[37]

EMILIO M. GARZA, Circuit Judge, concurs as to the judgment only.

---

[36] Because we dismiss for lack of evidence, we do not reach the other issues raised by First Gibraltar on appeal.

[37] We DENY Simms' motion under Rule 38 of the Federal Rules of Appellate Procedure to recover costs and damages. We also DISMISS as moot Simms' motion to disregard misrepresentations of fact and law in First Gibraltar's reply brief and assertions of error in its reply brief not asserted in its original brief.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 94-20386

GORDON D. SIMMS, ET AL.,
Plaintiffs,

GORDON D. SIMMS,
Plaintiff-Appellee,

versus
FIRST GIBRALTAR BANK, FSB, now known as
FIRST MADISON BANK, FSB,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC
(Opinion 5/31/96, 5 Cir., , F.3d)

(July 16, 1996)

Before JOLLY, DAVIS and EMILIO M. GARZA, Circuit Judges.
PER CURIAM:

(X) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor Judge in regular active service of the Court having requested that the Court be polled on

rehearing en banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

[signed by E. Grady Jolly]
United States Circuit Judge

Note: Judge Carolyn Dineen King and Judge Jerry E. Smith did not participate in the consideration of the suggestion for rehearing en banc.

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GORDON D. SIMMS,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO. H-91-3367
	§	
FIRST GIBRALTAR	§	
BANK, FSB, NOW	§	
KNOWN AS FIRST	§	
MADISON BANK, FSB,	§	
	§	
Defendant.	§	

FINAL JUDGMENT

Pursuant to the findings made by the jury in the Charge of the Court submitted (instrument #90) and the Court's finding and conclusion that First Madison Bank is one and the same as First Gibraltar Bank, the Court enters judgment on behalf of Gordon D. Simms against First Gibraltar Bank, FSB now known as First Madison Bank, FSB as follows:

(a)	Actual and punitive damages	$ 3,210,000.00
(b)	Attorneys fees	$ 71,110.00
(c)	Costs of Court	
(d)	Post judgment interest at the rate of 4.22% on the above sums.	

This is a FINAL JUDGMENT.

Signed this 21st day of March, 1994.

[Signed by Kenneth M. Hoyt]
KENNETH M. HOYT
United States District Judge

APPENDIX D

(EXCERPT FROM TRANSCRIPT
VOLUME 4, PP.4-223 & 4-227 - 4-229)

The Court: All right. I see. All right, relative to the defendant's Motion For Directed Verdict, the Court is going to overrule the motion. In my opinion, the discriminatory practices, if any, engaged in by First Gibraltar are not simply ones that must be proved by some statistical analysis. That is a way of proving it but that is not the only way of proving discrimination. Just as it doesn't require a person bringing a class action to prove discrimination of an individual nature. [From p.4-223]

The Court: . . . This is not a red lining case. And in my opinion, the plaintiff does not have to show that Gibraltar has a practice or habit of discriminating against black people or black property in black areas. They simply have to show that they discriminated on this occasion. This is an individual bringing an individual lawsuit based upon a package that he presented to that institution.

Ms. Gibson: Your Honor, I understand that the plaintiff doesn't want to call it red lining --

The Court: I am calling it what you all said you would not do at the beginning, right?

Ms. Gibson: Yes, sir. It is my understanding that the plaintiff is claiming that First Gibraltar Bank did not want to agree to his proposal because this property was located in a minority area.

The Court: That is not necessarily red lining because I think red lining goes further than that.

Mr. Hill: Yes.

The Court: Red lining goes to a specific intent on the part of an institution not to make any loans in that area. And to make that argument -- I mean to let it do that -- to permit you to argue that would mean that Gibraltar had already come into the area. Now, admittedly Gibraltar came into the area when there were whites buying and building and living in these units. Now, what they have done in the other parts of this area really isn't relevant to the question of whether or not, when presented with this package, they did not -- I think what I am saying is you are placing a burden on the plaintiff that the plaintiff doesn't have. The plaintiff doesn't have to prove that there is red lining in order to show there is discrimination.

Ms. Gibson: Your Honor, may I respond?

The Court: No, I think you need to move on. I have already responded. You filed your motion on -- you filed it so I am overruling your motion on at that.

Ms. Gibson: Your Honor, I believe that the Thomas case is directly on point.

The Court: I think you are responding to what I said we don't need to respond to. I have already dealt with the statistical analysis. I disagree that the statistical analysis is required for this particular case, period. [From Tr.4-227 - 4-229]

APPENDIX E

(EXCERPT FROM TRANSCRIPT VOLUME 13, PAGE 45)

Ms. White: "Again, the essence of our complaint with the language in this instruction is that it does not require any showing that the same or similar type of service requested by Mr. Simms was handled in a different manner for nonminorities as it was --

The Court: It is undisputed. That is why I overruled your objection. It is undisputed that is what the testimony is that they do handle these kind of proposals from River Oaks, Memorial and everywhere else in town.

Ms. White: Your Honor, I understand your position on this matter.

The Court: No, it is not a position. What I am telling you is I am not confusing the proposal that Mr. Simms presented with the services that he requested. It doesn't matter if he wanted to build a dog pound. The services he requested are the services that were under consideration. And those services, indisputably are services that are requested by other people all over town. That is the whole business of savings and loan institutions is to consider loan requests, loan modifications, refinance, drop clauses, add clauses and increase interest. That is the stuff they do. It is not in dispute. That is why I am overruling your objection."

APPENDIX F

(Excerpts from Record Pages 000802 - 000799)

". . . Along these lines, it is unlawful for any such institution to engage in unfair housing practices in the consideration or decision concerning a financial transaction. Title 42 U.S.C. § 3604(b) and 3605 provide in relevant part:

> [I]t shall be unlawful ...[t]o discriminate against any person in the terms, condition, or privileges of sale ... of a dwelling or in the provision of services or facilities ... because of race, [or] color ....
>
> 'It shall be unlawful for any person or entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions or such a transaction, because of race, color ... or national origin.'

In considering the discriminatory treatment issue the jury must consider whether First Gibraltar intended to discriminate against Simms and/or the potential purchasers or tenants.

An intent to discriminate is most often determined from the manner in which the complained of actions were done and the means used. An intent to discriminate is rarely, openly expressed. You may infer discriminatory motivation or intent if questionable actions of First Gibraltar are found to be arbitrary and unreasonable. . . .

. . .

You may find that a discriminatory housing practice, on the part of First Gibraltar, existed if you find from a

preponderance of the evidence, that Simms' request for loan modification was handled in a manner different from the manner in which requests for financial services involving properties not located in minority areas or occupied or owned by minority persons were generally handled.

You are instructed that First Gibraltar had a duty to receive and process the request of Simms for financial services in like manner as it customarily received and processed other requests for financial services which did not relate to properties in minority neighborhoods or which were minority owned or involving minority borrowers. Any refusal by First Gibraltar to process a request by Simms for financial services for reasons not also applicable to non-minority related requests, or departures from normal or substantive criteria, may be considered in determining whether or not the denial of the request of Simms was based upon racial grounds and was a discriminatory housing practice.

APPENDIX G

GIBRALTAR SAVINGS
Mortgage Banking Group

12555 Northborough
Houston, Texas 77067
P.O. Box 4639
Houston, Texas 77210-4639
(713) 872-2500

M E M O R A N D U M

TO: Del Chastain

FROM: Brenda Tomlinson

DATE: November 30, 1988

RE: Loan No. 31-99-10-59789
The Forest Apts.
Gordon Simms

The referenced borrower has approached us regarding a conversion of this property to cooperative housing.

This program would involve reorganizing ownership into a non-profit corporation, and selling shares of the corporation to the tenants/owners.

The proposal for Gibraltar is to refinance the existing balance of approximately $272,000 at 7.25% to a new loan of $232,000 at current market rates (10.5% to 11%). In addition, the National Cooperative Bank will fund approximately $400,000 to $500,000 in second lien financing re rehab, with a grant of matching funds from the city of Houston. Mr. Simms has additional information on this issue.

This project was placed on hold after our initial discussion; however, on Monday Mr. Simms advised they are not proceeding fully and hope to close within 45 days.

Enclosed you will find the package as submitted by Mr. Simms, and copies of our loan documents.

The loan statistics are as follows:

Due date:	12/1/88
Prin. Balance	$272,299.07
P & I	2,665.09
Interest Rate	7.25%
Maturity Date	9/2002

The borrower is anxious to have some idea of our position in this matter. Please let me know. If you have any questions or need any further information, please contact me.

BST/bs
Enc.

[PLAINTIFF'S EXHIBIT 9
H-91-3367]

APPENDIX H

[Excerpt from Tr. Vol. II p.2-118]

Q [Hill] What about the fact that 50 of the 58 units, in your understanding, were going to be sold to a cooperative housing unit caused you concern as a lender?

A [Chastain] My concern as a lender is that they would be in charge, that the co-op would be in charge of the apartment house and not Mr. Simms. We would have no one to turn to.